SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 235

RICHMOND MORTGAGE & LOAN CORPORATION, APPELLANT,

vs.

WACHOVIA BANK AND TRUST COMPANY AND ALEXANDRA GARRETT JOHNSTON, EXECUTORS OF THE ESTATE OF ROBERT P. JOHNSTON, DECEASED

APPEAL FROM THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

INDEX.

	Original	Print
Proceedings in Supreme Court of North Carolina	1	1
Caption	1	1
Record from General County Court of Buncombe County	1	1
Complaint	1	1
Answer	4	4
Amended answer	6	6
Reply	7	7
Statement of case on appeal	10	9
Statement of evidence	10	10
Offers in evidence	10	11
Plaintiff's motion for judgment	14	14
Admission as to ownership of notes, etc.	14	14
Testimony of C. N. Walker	15	14
L. L. Merchant	16	16
A. G. Carver	17	16
J. E. Dunn	17	17
H. W. Dysart	17	17
R. P. Booth	18	17
T. Raysor Salley	18	17

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 23, 1936.

	Original	Print
Record from General County Court of Buncombe County—Continued.		
Statement of evidence—Continued.		
Motion to strike answer	19	18
Renewal of plaintiff's motion for judgment	19	18
Testimony of J. C. Dillard	19	19
James Carroll	19	19
Plott Boyd	20	20
Renewal of plaintiff's motion for judgment	21	20
Issues and answers thereto	21	21
Charge to jury	22	21
Judgment	30	28
Appeal entries	31	29
Assignments of error	31	30
Proceedings in Superior Court of Buncombe County	32	31
Judgment	32	31
Appeal entries	33	32
Assignments of error	34	32
Stipulation as to record	36	35
Opinion, Connor, J.	37	38
Judgment	41	41
Petition for appeal	42	42
Assignments of error	43	42
Prayer for reversal	45	44
Bond on appeal (omitted in printing)	46	
Order allowing appeal	49	44
Præcipe for transcript of record	51	45
Citation and service (omitted in printing)	53	
Clerk's certificate	55	47
Statement of points to be relied upon and designation as to printing record	56	47

[fol. 1]

IN SUPREME COURT OF NORTH CAROLINA

FALL TERM, 1935

RICHMOND MORTGAGE & LOAN CORPORATION

v.

WACHOVIA BANK & TRUST COMPANY and ALEXANDRA GARRETT JOHNSTON, Executors of the Estate of Robert P. Johnston, Deceased

Before Oglesby, J., August Term, 1935, Buncombe Superior Court—Plaintiff Appealed

Summons Dated June 18, 1934, Out of the General County Court, Showing Service June 18, 1934

IN GENERAL COUNTY COURT OF BUNCOMBE COUNTY

COMPLAINT

The plaintiff, for its cause of action against the defendants, alleges and avers:

1. That the plaintiff is a corporation organized and existing under and by virtue of the laws of the State of Virginia, with its principal place of business at Richmond, Va.

2. That the defendant, Wachovia Bank and Trust Company, is a banking corporation organized and existing under and by virtue of the laws of the State of North Carolina, with an office at Asheville, North Carolina, and the defendant, Alexandra Garrett Johnston, is a citizen and resident of the State of North Carolina, and that the said defendants jointly are executors of the estate of Robert P. Johnston, deceased, and have at all the times hereinafter set forth been qualified as such executors and have been carrying on and attending to the duties as executors of said estate.

[fol. 2] 3. That on or about the 15th day of August, 1928, the said defendants, as executors of the estate of Robert P. Johnston, deceased, borrowed from the State-Planters Bank & Trust Company, of Richmond, Virginia, the sum of

$8,000.00 and as evidence of said indebtedness executed their promissory negotiable notes in the aggregate amount of $8,000.00, said notes being payable over a period of years with the last and final payment of $6,400.00 becoming due on August 15, 1933, said notes so executed by the defendants bearing interest at the rate of six per cent per annum, payable semi-annually, and being evidenced by interest notes.

4. That at the same time that the said defendants executed and delivered the above referred to promissory notes they also executed and delivered a deed of trust to David B. Harris and Tristram T. Hyde, Jr., Trustees, which said deed of trust was dated the 15th day of August, 1928, and by the terms of said deed of trust the said defendants pledged as security for said indebtedness of $8,000.00 a certain tract or parcel of land, together with the improvements located thereon, situate in the City of Asheville, County of Buncombe and State of North Carolina, and being more particularly described as located on the Eastern margin of Grove Street and being a part of the property conveyed to R. P. Johnston, et al., by deed dated December 14, 1905, and recorded in the office of the Register of Deeds for Buncombe County, North Carolina, in deed book 141, at page 434; said deed of trust being of record in the Office of the Register of Deeds for Buncombe County, North Carolina, in deed of trust book 300, at page 87, and to which reference is made for further particulars as to the express terms thereof.

5. That the said defendants, as executors of the estate of Robert P. Johnston, deceased, paid or caused to be paid on said principal indebtedness the sum of $1,200.00, but defaulted in the payment of the principal indebtedness due on August 15, 1932, and also defaulted in the payment of [fol. 3] the interest which became due on August 15, 1932, and because of the continued defaults of the said defendants in the payment of said indebtedness the said holder and owner of said notes called on the acting Trustee, David B. Harris, in said deed of trust to foreclose the said property in accordance with the power of sale contained in said deed of trust, and thereupon declared the whole of said indebtedness due and payable as the said holder of said notes had the right to do in accordance with the express terms and conditions of said notes and deed of trust.

6. That thereafter the said David B. Harris, acting Trustee, did advertise said property in accordance with the terms of said deed of trust and in accordance with the statutory law of the State of North Carolina, and exposed the same to public sale on the 19th day of June, 1933, where and when the Madison Investment Company, Incorporated, a corporation, became the last and highest bidder for the same at the price of $3,000.00, and ten days thereafter elapsing and no raised bid having been filed with the Clerk of the Superior Court of Buncombe County, as provided by the statutory law of the State of North Carolina the said sale was confirmed and deed to the property was made to said Madison Investment Company, Incorporated.

7. That out of the proceeds of said sale the said Trustee paid, or caused to be paid, advertising costs in the sum of $6.64, Court costs in the sum of $2.25, and Trustee's fee in the sum of $150.00, and making an aggregate amount of $158.89, and after deducting said sum so expended by the Trustee from the $3,000.00, the price bid for said property, there remained to be credited on said notes and paid to said noteholders the sum of $2,841.11.

8. That at the time of said foreclosure sale there was due on said indebtedness the principal sum of $6,800.00, together with the sum of $204.00 interest that matured on August 15, 1932, and also the sum of $192.00 of interest that matured on February 15, 1933, and making a total indebtedness due of $7,196.00 with interest thereon from [fol. 4] February 15, 1933, to the date of sale, to-wit: June 19, 1933, which said interest amounted to $179.90, and making a total of principal and interest due on the date of said sale of $7,375.90; that after crediting on said amount due the sum of $2,841.11 realized from the sale of said property on June 19th, 1933, there remained due and payable as of said date the sum of $4,534.79, together with interest thereon from June 19, 1933, until paid, and although demand has been made upon the defendants for the payment of the same they have refused and neglected to pay the same.

9. That the plaintiff in this action is now the owner and holder of said promissory notes as executed by the said defendants, having purchased the same for a valuable consideration.

Wherefore, plaintiff prays the Court:

1. That it have and recover of the said Wachovia Bank & Trust Company and Alexandra Garrett Johnston, joint executors of the estate of Robert P. Johnston, deceased, the sum of $4,534.79, together with interest thereon from the 19th day of June, 1933, until paid.

2. For the costs of this action to be taxed by the Clerk.

3. And for such other and further relief as to the Court may seem just and proper.

Harkins, Van Winkle & Walton, Attorneys for Plaintiff.

(Verified.)

IN GENERAL COUNTY COURT OF BUNCOMBE COUNTY

ANSWER

The defendants, answering the complaint filed in the above entitled action, say:

1. That they are informed and believe that the allegations of paragraph 1 of said complaint are true.

2. That the allegations of paragraph 2 of said complaint are admitted.

3. That the allegations of paragraph 3 of said complaint are admitted.

4. That the allegations of paragraph 4 of said complaint are admitted.

5. That the allegations of paragraph 5 of said complaint are admitted.

[fol. 5] 6. That the allegations of paragraph 6 of said complaint are admitted.

7. That the allegations of paragraph 7 of said complaint are admitted.

8. That the allegations of paragraph 8 of said complaint are admitted.

9. That the defendants have no knowledge or sufficient information upon which to form a belief as to the truth

of the allegations contained in paragraph 9 of said complaint, and therefore, deny the same.

Further Answer and Defense

Further answering said complaint, and by way of defense to the cause of action therein set forth, the defendants allege:

1. That the defendants are informed and believe, and so allege, that at the time of the foreclosure of the deed of trust mentioned in the complaint, to-wit: June 19, 1933, the State-Planters Bank & Trust Company was the owner and holder of the indebtedness secured by said deed of trust.

2. That the defendants are informed and believe, and so allege, that on June 19, 1933, the Madison Investment Company, the purchaser at said foreclosure sale, was a subsidiary of said State-Planters Bank & Trust Company, the owner and holder of said indebtedness, the said State-Planters Bank & Trust Company, being, at the time, the owner and holder of the capital stock of said Madison Investment Company, except qualifying shares held by Directors.

3. That, therefore, the holder of the obligation secured by said deed of trust became the purchaser of the property described therein, and directly or indirectly took title to the same.

4. That at the time of the sale under foreclosure the property described in said deed of trust and sold was fairly worth the amount of the debt secured by said deed of trust and the amount bid at said sale was substantially less than the true value of said property.

5. That the defendants are informed and believe, and so allege, that the plaintiff is a subsidiary of State-Planters [fol. 6] Bank & Trust Company, said State-Planters Bank & Trust Company being the owner of the capital stock of the plaintiff, except qualifying shares held by directors.

6. That the defendants are informed and believe, and so allege, that the State-Planters Bank & Trust Company is the owner, directly or indirectly, of indebtedness mentioned in the complaint and is, therefore, the real party in interest in this action, and the plaintiff is not entitled to maintain or to prosecute the same.

Wherefore, having fully answered, the defendants pray:

1. That the plaintiff take nothing by its action.

2. That the defendants recover of the plaintiff their costs incurred herein.

3. That the defendants have such other and further relief as to the Court may seem just and proper.

Bourne, Parker, Bernard & DuBose, Attorneys for Defendants.

(Verified.)

IN GENERAL COUNTY COURT OF BUNCOMBE COUNTY

AMENDED ANSWER

The defendants, by leave of Court, answering the complaint heretofore filed herein and the reply of the plaintiff, allege:

1. That the defendants are informed and believe and so allege, that at the time of the foreclosure of the deed of trust mentioned in the complaint, to-wit: June 19, 1933, and prior to and since said date, the Richmond Mortgage & Loan Corporation was the owner and holder of the indebtedness secured by said deed of trust, and which is the subject of this suit.

2. That the defendants are informed and believe, and so allege, that on June 19, 1933, and prior to and since said date, the Richmond Mortgage & Loan Corporation owned all the capital stock of the Madison Investment Company, the purchaser at said foreclosure sale, and that said Madison Investment Company was, and is, a subsidiary of said Richmond Mortgage and Loan Corporation, the owner and [fol. 7] holder of said indebtedness, and upon the foreclosure aforesaid, the said Richmond Mortgage & Loan Corporation became indirectly the purchaser at said sale and the owner of the property described in said deed of trust.

3. That therefore the holder of the obligation secured by said deed of trust became the purchaser of the property described therein, and directly or indirectly took title to the same.

4. That at the time of the sale under foreclosure above mentioned, the property described in said deed of trust and sold had a fair market value equal to the amount of the debt secured by said deed of trust and was fairly worth the amount of the debt.

5. That the amount bid at said foreclosure sale was substantially less than the true value of the property described in said deed of trust.

6. That the value of the outstanding capital stock of the Madison Investment Company is only $30.00, and said Company is indebted to the plaintiff in approximately $120,000.00, and its indebtedness to all other persons is approximately $3,000.00.

Wherefore, having fully answered, the defendants pray:

1. That the plaintiff take nothing by its action.

2. That the defendants recover of the plaintiff their costs incurred herein.

3. That the defendants have such other and further relief as to the Court may seem just and proper.

Bourne, Parker, Bernard & DuBose, Attorneys for Defendants.

(Verified.)

IN GENERAL COUNTY COURT OF BUNCOMBE COUNTY

REPLY

The plaintiff replying to the further answer and defense of the defendant alleges and avers:

1. That the allegations contained in paragraph 1 of said further answer and defense are untrue and are, therefore, denied.

2. That the allegations contained in paragraph 2 of said further answer and defense are untrue and denied; the [fol. 8] truth of the matter being that the Madison Investment Company and the State-Planters Bank & Trust Company are two separate and distinct corporate entities.

3. Answering paragraph 3 of said further answer and defense, this plaintiff says that the conclusions of law and facts as set forth therein are untrue and are, therefore, denied.

4. That the allegations contained in paragraph 4 of the said further answer and defense are untrue and, therefore, denied.

5. That the allegations contained in paragraph 5 of said further answer and defense are untrue and are, therefore, denied, the truth of the matter being that State-Planters Bank & Trust Company and the plaintiff in this action are separate and distinct corporate entities.

6. That the allegations contained in paragraph 6 of said further answer and defense are untrue and are, therefore, denied.

Further Reply

As a further reply to the said defense attempted to be set up by the defendants, this plaintiff alleges and avers:

1. That if the defendants are attempting to rely for their defense in this action upon Section 2593 (d) of the North Carolina Code, and being Section 3, Chapter 275, Public Laws of North Carolina, 1933, this plaintiff says that said Section cannot and does not apply as a defense in this case; in that, the said act was passed at the 1933 Session of the General Assembly of the State of North Carolina, and the notes sued on in this action by the plaintiff were executed by the defendants on or about the 15th day of August, 1928.

2. That this plaintiff draws in question the validity of Section 3, Chapter 275, Public Laws of North Carolina, 1933, on the ground that it is in violation of and repugnant to the provisions of Article 1, Section 10 of the Constitution of the United States, in that said law impairs the obligation of contract entered into by and between the plaintiff and the defendants, and which contract is dated prior to the passage of said act, and in that at the time of [fol. 9] the passage of said act and prior thereto this plaintiff had the right in law to proceed to recover a judgment personally from the defendants for the full amount of said indebtedness, and the effect of said act is to deprive the

plaintiff of this right; and plaintiff draws in question the validity of said act on the further ground that it is repugnant to the provisions of the 5th Amendment to the Constitution of the United States in that it deprives the plaintiff of a property right vested in said plaintiff prior to the passage of said act without due process of law and in violation of the terms of plaintiff's contract with defendants; and plaintiff draws in question the validity of said Section on the further ground that it is repugnant to and in violation of the provisions of Section 1 of the 14th Amendment to the Constitution of the United States, in that said act denies to this plaintiff the equal protection of the law, in that it eliminates certain rights of this plaintiff due to the fact that said plaintiff is the holder of a contract secured by a mortgage on real estate, whereas, the holder of like contracts under the same conditions wherein no mortgage was pledged as security retains their original rights without being affected by said act; and said plaintiff further draws in question the validity of said Act on the further ground that it is repugnant to the provisions of Article 1, Section 17 of the Constitution of the State of North Carolina, and Article 1, Section 35 of the said Constitution of the State of North Carolina, and Article 1, Section 7 of the Constitution of the State of North Carolina, in that said Act deprives this plaintiff of a property right established by contract and which was in full force and effect and which property right was vested in said plaintiff prior to the passage of said Act, and deprives this plaintiff of said rights without due process of law.

Wherefore, this plaintiff prays that it have relief as asked for in the complaint filed in this action.

[fol. 10] Harkins, Van Winkle & Walton; Attorneys for Plaintiff.

(Verified.)

Statement of Case on Appeal

This is an action brought in the General County Court, whereby the plaintiff is seeking to recover a deficiency judgment in the sum of $4,534.79, with interest from June 19, 1933. Defendants, as Executor, borrowed the sum of

$8,000.00, and gave a deed of trust and notes, covering certain property belonging to the estate, as security therefor. The property was foreclosed on June 19, 1933, and bid in for the benefit of the note-holders. The deficiency above referred to resulted from said foreclosure sale. Defendants offer evidence under Section 2593 (d) to show that the property was reasonably worth the amount of the debt, or in excess thereof, on the date of sale. The Judge of the General County Court held that the Act was constitutional, and submitted the case to the jury on the issues as shown in the record.

On exceptions and errors assigned, appeal was made to the Superior Court of Buncombe County, which said Court held the Act constitutional and affirmed the judgment of the lower Court. The only question involved in this appeal is whether or not C. S. 2593 (d), being Section 3, Chapter 275, Public Laws of North Carolina, 1933, is constitutional.

IN GENERAL COUNTY COURT OF BUNCOMBE COUNTY

Statement of Evidence

Plaintiff's Evidence

OFFERS IN EVIDENCE

Plaintiff offers in evidence paragraph 1 of the complaint as follows:

"That the plaintiff is a corporation organized and existing under and by virtue of the laws of the State of Virginia, with its principal place of business at Richmond, Virginia."

Plaintiff offers in evidence the corresponding paragraph of the answer, in which above is admitted.

Plaintiff offers in evidence paragraph 2 of the complaint, as follows:

"That the defendant, Wachovia Bank & Trust Company, is a banking corporation organized and existing under and [fol. 11] by virtue of the laws of the State of North Carolina, with an office at Asheville, North Carolina, and the

defendant, Alexandra Garrett Johnston, is a citizen and resident of the State of North Carolina, and that the said defendants jointly are executors of the estate of Robert P. Johnston, deceased, and have at all the times hereinafter set forth been qualified as such executors and have been carrying on and attending to the duties as executors of said estate".

Plaintiff offers in evidence the corresponding paragraph 2 of the answer, in which above is admitted.

Plaintiff offers in evidence paragraph 3 of the complaint, as follows:

"That on or about the 15th day of August, 1928, the said defendants, as executors of the estate of Robert P. Johnston, deceased, borrowed from the State Planters Bank & Trust Company, of Richmond, Virginia, the sum of $8,000.00, and as evidence of said indebtedness executed their promissory negotiable notes in the aggregate amount of eight thousand dollars, said notes being payable over a period of years with the last and final payment of $6,400.00 becoming due on August 15, 1933, said notes so executed by the defendants bearing interest at the rate of six per cent per annum, payable semi-annually, and being evidenced by interest notes."

Plaintiff offers in evidence the corresponding paragraph 3 of the answer, in which that is admitted.

Plaintiff offers in evidence paragraph 4 of the complaint:

"That at the same time that the said defendants executed and delivered the above referred to promissory notes they also executed and delivered a deed of trust to David B. Harris and Tristram T. Hyde, Jr., Trustees, which said deed of trust was dated the 15th day of August, 1928, and by the terms of said deed of trust the said defendants pledged as security for said indebtedness of eight thousand dollars a certain tract or parcel of land, together with the improvements located thereon, situate in the City [fol. 12] of Asheville, County of Buncombe, and State of North Carolina, and being more particularly described as located on the eastern margin of Grove Street and being a part of the property conveyed to R. P. Johnston, et al., by deed dated December 14, 1905, and recorded in the office of the Register of Deeds for Buncombe County, North

Carolina, in deed book 141, at page 434; said deed of trust being of record in the office of the Register of Deeds for Buncombe County, North Carolina, in Deed of Trust Book 300, at page 87, and to which reference is made for further particulars as to the express terms thereof".

Plaintiff offers in evidence the corresponding paragraph 4 of the answer, in which that is admitted.

Plaintiff offers in evidence paragraph 5 of the complaint:

"That the said defendants, as executors of the estate of Robert P. Johnston, deceased, paid or caused to be paid on said principal indebtedness the sum of $1200.00, but defaulted in the payment of the principal indebtedness due on August 15, 1932, and also defaulted in the payment of the interest which became due on August 15, 1932, and because of the continued defaults of the said defendants in the payment of said indebtedness the said holder and owner of said notes called on the acting Trustee, David B. Harris, in said deed of trust, to foreclose the said property in accordance with the power of sale contained in said deed of trust, and thereupon declared the whole of said indebtedness due and payable as the said holder of said notes had the right to do in accordance with the express terms and conditions of said notes and deed of trust."

Plaintiff offers in evidence the corresponding paragraph 5 of the answer, in which above is admitted.

Plaintiff offers in evidence paragraph 6 of the complaint:

"That thereafter the said David B. Harris, acting Trustee, did advertise said property in accordance with the terms of said deed of trust and in accordance with the stat- [fol. 13] utory law of the State of North Carolina, and exposed the same to public sale on the 19th day of June, 1933, where and when the Madison Investment Company, Incorporated, a Corporation, became the last and highest bidder for the same at the price of $3,000.00, and ten days thereafter elapsing and no raised bid having been filed with the Clerk of the Superior Court of Buncombe County, as provided by the statutory law of the State of North Carolina, the said sale was confirmed and deed to the property was made to said Madison Investment Company, Incorporated."

Plaintiff offers in evidence corresponding paragraph 6 of the answer, in which the allegations are admitted.

Plaintiff offers in evidence paragraph 7 of the complaint:

"That out of the proceeds of said sale the said Trustee paid or caused to be paid advertising costs in the sum of $6.64, Court costs in the sum of $2.25, and Trustee's fee in the sum of $150.00, and making an aggregate amount of $158.89, and after deducting said sum so expended by the Trustee from the three thousand dollars, the price bid for said property, there remained to be credited on said notes and paid to said note-holders the sum of $2,841.11."

Plaintiff offers in evidence paragraph 7 of the answer, in which those allegations are admitted.

Plaintiff offers in evidence paragraph 8 of the complaint:

"That at the time of said foreclosure sale there was due on said indebtedness the principal sum of $6,800.00, together with the sum of $204.00 interest that matured on August 15, 1932, and also the sum of $192.00 of interest that matured on February 15, 1933, and making a total indebtedness due of $7,196.00, with interest thereon from February 15, 1933, to the date of sale, to-wit: June 19, 1933, which said interest amounted to $179.90, and making a total of principal and interest due on the date of said sale of $7,375.90; that after crediting on said amount due the sum of $2,841.11 realized from the sale of said property on June [fol. 14] 19, 1933, there remained due and payable as of said date the sum of $4,534.79, together with interest thereon from June 19, 1933, until paid, and although demand has been made upon the defendants for the payment of the same, they have refused and neglected to pay the same."

Plaintiff offers in evidence the corresponding paragraph 8 of the answer, in which those allegations are admitted.

Plaintiff offers in evidence paragraph 1 of amended answer:

"That the defendants are informed and believe, and so allege, that at the time of the foreclosure of the deed of trust mentioned in the complaint, to-wit: June 19, 1933, and prior to and since said date, the Richmond Mortgage and Loan Corporation was the owner and holder of the indebtedness secured by said deed of trust and which is the subject of this suit."

Plaintiff offers in evidence this note if there is no objection from the defendant, marked Plaintiff's Exhibit I.

Plaintiff offers in evidence deed of trust book 300, at page 87, which is the deed of trust from the defendants to David B. Harris, acting Trustee, dated August 15, 1928.

Plaintiff rests.

MOTION FOR JUDGMENT

Plaintiff, through its counsel, calls attention of the Court to the Reply filed in this cause whereby the question is raised as to the unconstitutionality of the Act which defendant pleads as a defense, and moves the Court that Judgment be rendered for the plaintiff.

Overruled—exception. This is plaintiff's Exception No. 1.

Defendant's Evidence

ADMISSION AS TO OWNERSHIP OF NOTES, ETC.

Counsel for plaintiff admits that plaintiff was the owner of the notes secured by the deed of trust at the time of foreclosure, and that Madison Investment Company became the purchaser of said property on behalf of the plaintiff.

[fol. 15] C. N. WALKER testified: I am an Assistant Trust Officer of Wachovia Bank & Trust Company, and have been since 1929. The property given as security for the indebtedness borrowed by the defendants from the plaintiff, and evidenced by the deed of trust and notes, is the property known as 44 Grove Street, in the City of Asheville. I have general supervision of the Trust Department of the Asheville Office of the Wachovia Bank & Trust Company, and I deal with and handle the real estate that comes into the possession of the Trust Department of said bank. The bank has acted as Executor of the Johnston estate since June 11, 1924, and the property known as 44 Grove Street was a part of the assets of this estate, and is the same property covered by the deed of trust offered in evidence by the plaintiff. I have had considerable experience in handling real estate, both for the Trust Department of the bank

and for various insurance companies and in my own business.

I have an opinion satisfactory to myself, as to the reasonable, fair market value of the property, covered by the deed of trust, on the 19th day of June, 1933. I would say that the property on that date was worth approximately $8,500.00.

Cross-examination:

We carried this property on the books of the Bank at the tax assessed valuation. I don't know what the money was used for that was derived from this loan, but my impression is that it was used for the purpose of paying off an old debt that was against the property. The estate owed the Bank certain money, but I don't think this money was used for the payment of the debt due the bank. This property is a house and lot located near the center of Asheville, and the lot has a frontage of 112 feet and approximately 200-foot depth. I would say that the land is worth from $50.00 to $60.00 a front foot, and that the building is worth from $3,000 to $3,500. The residence was formerly used as an office for a group of doctors, and I think it has been built for something like 40 years. It is an old residence, brick [fol. 16] construction, solid brick and substantial wood and plastered walls inside. It is not obsolete. At the time of foreclosure, we were getting about $30.00 to $35.00, but moved the tenant out because they would not pay the rent. My recollection is that it was assessed the year 1933 for taxes at $16,500.00, and the tax was figured at the prevailing rate. I don't know what the fire insurance premiums were, but I think they would run from eight to a hundred dollars. We didn't have an awful lot of repairs during the year 1933, but prior to that time we spent considerable money repairing the inside, and got a large rent for it, about $150 per month.

In 1933, we didn't get $30 or $35 a month all the time, and had to move the tenant out because she wouldn't pay the rent. I understand the figures in the complaint, as to the amount of the indebtedness, are correct. We gave the property up when there was only $7375.00 due on it, even though I thought it was worth $8500.00. We tried to get the Company not to foreclose, and the estate did not have any money to pay the indebtedness. We had not paid any-

thing since 1932, and over a year before the foreclosure. At the time of the foreclosure, the property wasn't bringing in enough money to pay the taxes and insurance premiums.

MR. L. L. MERCHANT testified: I have lived in Asheville 35 years, and I am a building contractor and have been engaged in that business for 30 years. During this time I have built most every kind of building. I have never built a solid brick wall building, but I have built many veneer brick buildings. I have examined the building at 44 Grove Street, in the City of Asheville, and I am familiar with the conditions as to building prices which prevailed on June 19, 1933, in and about the City of Asheville, and I have an opinion, satisfactory to myself, as to the replacement value of this building on June 19, 1933. I base that on the difference between today's costs and the costs of June, 1933. I would say the replacement cost of that building in June, [fol. 17] 1933, would be approximately 20% less than it is today, and which would be about $9,600.00. The building is an old building, I know to be at least 40 years old. It has solid brick 12-inch walls, tin roof, has five rooms and one bath, old fashioned construction. The building is in fair condition considering its age. I have an opinion as to the fair value of the building on June 19, 1933, and would place the sound value of that building at 25%, leaving the value at $2,400.00.

Cross-examination:

I would value this building on June 15, 1933, after taking into consideration the depreciation, at $2,400.00.

MR. A. G. CARVER testified: I have been in the real estate business in the City of Asheville for 10 or 11 years. I have examined the property known as 44 Grove Street, in the City of Asheville, and I have an opinion, satisfactory to myself, as to the value of that property known as 44 Grove Street, on June 19, 1933. I would place the value on the land at around $60.00 a foot, front foot, and the value of the building at $2,000.00.

Cross-examination:

I place the value of the land at $6,720.00 and the building at $2,000.00, which makes a total of $8,720.00.

J. E. DUNN testified: I have been in the real estate business in the City of Asheville, for 13 years, and I am familiar with the property known as 44 Grove Street, in the City of Asheville. I have an opinion as to its fair, reasonable value on June 19, 1933, and I would say the land was worth $50.00 a front foot and the building was worth $2250.00.

H. W. DYSART testified: I have lived in Asheville 20 years, and have been in the real estate business the last 9 years. I have examined the property known as 44 Grove Street, and have an opinion as to its reasonable, fair value on the 19th day of June, 1933. In my opinion, it was worth between $8,000 and $9,000.

[fol. 18] Cross-examination:

I believe it would be safer to say that the value of the property is $8,000.00, rather than $9,000.00.

R. P. BOOTH testified for defendant: I am in the real estate business in the City of Asheville, and have been for the past 14 years. I have heretofore been president of the Asheville Real Estate Board. I have examined the property known as No. 44 Grove Street, in the City of Asheville. I am President of the State Association of Real Estate Boards. I have an opinion as to the value of the property known as 44 Grove Street, as of June 19, 1933. I would say, in my opinion, the property is worth $50.00 a front foot, and the house is worth $3,000.00.

T. RAYSOR SALLEY testified for defendant: I am an officer of the Richmond Mortgage and Loan Corporation, the plaintiff in this action. I am familiar with the property

known as 44 Grove Street, in the City of Asheville. This property has been listed with realtors in the City of Asheville for sale and, I think, at the price of $8,500.00. We have printed a list with this property on it. I can't tell exactly what the sale price is until I look at the list. I will try to get a list from one of the realtors in Asheville.

Cross-examination:

I am familiar with the property known as 44 Grove Street, although I have not inspected it for several years. I have an opinion as to the value of the property in June, 1933, and I would say it was $6,000.00. I think when it was foreclosed it was renting for about $25.00 a month.

Redirect examination:

"Q. Would you read from that listing what it relates to number 44 Grove Street in the City of Asheville?

Objection—overruled—exception.

A. 44 Grove Street. Lot 112 x 293. 8 room-, 2-story brick, four bedrooms, two baths, reception room, living and [fol. 19] dining rooms, kitchen. Can have three room and bath apartment. Dirt basement, hot water heat, out houses, good garden space, plenty of garage space.

Tax reference: Ward four, Sheet 2, Lot 24.
Tax valuation: 1932 $16,500
1933 .....

Sale price: $12,500"

MOTION TO STRIKE

Motion to strike out answer—motion denied—exception —this is plaintiff's Exception No. 2.

Defendant rests.

RENEWAL OF MOTION FOR JUDGMENT

At the close of defendants' evidence, the plaintiff renews its motion for judgment on the pleadings, contending that

the Act under which the defense is made is unconstitutional. Motion overruled—exception—this is plaintiff's Exception No. 3.

J. C. DILLARD testified for plaintiff (in rebuttal): I have been engaged in the real estate business in the City of Asheville for approximately 12 years, and have had a great deal of experience in the appraising of property located in Asheville. I am familiar with, and have inspected the property known as 44 Grove Street, and I have an opinion, satisfactory to myself, as to its true value on June 15, 1933. In my opinion, the land was worth $50.00 a front foot, or $5,600.00, and the building is of practically no value, I would say it was worth not over $1200.00, and the whole property is worth, in my opinion, $6,800.00. I arrive at this by allowing 2% obsoleseence on the building over a period of 30 years. The rent of the property has to be taken into consideration in making up its present value.

Cross-examination:

I know Mr. L. L. Merchant, and I know his reputation as a builder and I consider he knows what he is talking about when he states the value of a building.

MR. JAMES CARROLL testified for plaintiff: I am District Appraiser for the Home Owners' Loan Corporation, and [fol. 20] I am familiar with the values of properties in the City of Asheville. I have made an inspection and appraisal of the property known as 44 Grove Street, in the City of Asheville, and I have an opinion satisfactory to myself as to the value of this property on June 15, 1933. In my opinion the property was worth, on that date, the sum of $6108.00. I will explain to the Court how I arrived at this appraisal. The property is in transition from residence to business property and the section is building up about 90%. In my opinion the land is valued at $5600.00, or at $50.00 a front foot. It is an old building, and I figured the square footage. The effective age of the building was 30 years; the total depreciated replacement value is $7,574.00, and then I take into consideration the rental value

of the property, which I placed at $35.00 per month, capitalizing the whole valuation at $18,324.00, and dividing it by ⅓, I arrived at the present valuation of $6,108.00.

Cross-examination:

There is a garage on the property in a dilapidated condition. There is space for four cars. I valued the land at $5600.00 and the summation value of the building at $508.00. I consider L. L. Merchant a safe, sound builder, and I do not believe Mr. Merchant or I either are infallible in our judgment. I would take his value rather than mine.

Redirect examination:

The method I used in arriving at the value is an approved method of appraisal.

Mr. Plott Boyd testified for plaintiff: I have lived in the City of Asheville for 20 years, and have been engaged in the real estate business for that length of time. I am a member of the City Council for the City of Asheville. I am familiar with the property known as 44 Grove Street in the City of Asheville, and have an opinion as to its true value on June 15th, 1933. In my opinion the property was worth, on that date, $6,108.00. I used the same method in arriving at this valuation as was used by Mr. James Carroll.

[fol. 21] Cross-examination:

In my opinion, the land is worth $5600.00 and, on the basis of our appraisal, this would make the building worth $508.00.

Plaintiff rests.

Renewal of Motion for Judgment

At the close of all the evidence plaintiff renews its motion for judgment against the defendant, contending that the Act, which is Section 2593 (d) of the North Carolina Code, is unconstitutional, and under which Act the defendant put on its evidence as to the valuation of the property.

Overruled—exception. This is plaintiff's Exception No. 4.

ISSUES

1. What was the amount of the indebtedness secured by the deed of trust described in the complaint on June 19, 1933?

Answer. $7375.90.

2. Did the plaintiff either directly or indirectly become the purchaser of the property at the foreclosure sale?

Answer. Yes.

3. What was the property sold fairly worth at the time and place of sale?

Answer. $8,000.00.

4. What amount was unpaid on the note described in the complaint after all credits have been allowed immediately subsequent to the sale on June 19, 1933?

Answer. $4,534.79, with interest from June 19, 1933.

Upon the tendering of the foregoing issues, and in apt time, counsel for plaintiff objected to the submission of issues 2 and 3.

Objection overruled—exception. This is plaintiff's Exception No. 5.

[fol. 22] JUDGE'S CHARGE

Gentlemen of the jury, this is an action brought in this court by the Richmond Mortgage Company against the Wachovia Bank & Trust Company and Mr. Johnston, executors of the Will of the late R. P. Johnston, which plaintiff is seeking to recover the balance which he alleges is due upon a loan of money made by the plaintiff to the defendants in 1928. Plaintiff makes certain allegations in the complaint. Some of them are denied by the defendants and the defendants set up as a further answer that the plaintiff in foreclosing on the security pledged for the loan did not give to the defendant the credit for the fair value of the property taken under the foreclosure of the suit.

There are four issues which arise upon the pleadings. These issues or questions are submitted to you by the court for you to answer as you find the facts to be from the evidence, and by its greater weight. The first issue is: "What

was the amount of the indebtedness secured by the deed of trust described in the Complaint on June 19, 1933?"

The Court instructs you that——

(Interrupted.)

Mr. Bernard: I suggest Your Honor answer those questions.

Court: You don't want an instruction in the record about it. You don't want any instruction in the record about the issues.

Mr. Bernard: As to one, two and four Your Honor might answer those from the admissions.

Court: Gentlemen, there is no controversy about the first issue, if you believe the evidence and find the facts as shown by all the evidence, you will answer the first issue $7,375.90. I penciled that answer in here for you.

Mr. Bernard: Just so they can add the figures.

Court: The second issue is: "Did the plaintiff either directly or indirectly become the purchaser of the property at the foreclosure sale?"

If you find the facts to be as testified to by the witnesses [fol. 23] and shown by all the evidence, you will answer that issue Yes. I have written that answer for you.

The fourth issue is: "What amount was unpaid on the note described in the complaint after all credits have been allowed immediately subsequent to the sale on June 19, 1933?"

Gentlemen, there is no controversy about the fourth issue, if you believe the evidence and find the facts as shown by all the evidence you will answer the fourth issue $4,534.79. I penciled the answer in here for you.

(A) The third issue is: "What was the property sold fairly worth at the time and place of sale?"

Upon the issue the burden is upon the plaintiff to satisfy you, by the greater weight of the evidence, that the property was worth, not in excess of the amount of the indebtedness and it contends it was not worth in excess of the amount of the debt at the time of the foreclosure on June 19, 1933, and the amount of the debt on that date was $7,375.90.

Plaintiff contends the fair value of the property on that date was less than that amount or not in excess of it.

Plaintiff has offered you the evidence of the allegations which are admitted, that is, as to the amount of the indebtedness and default in the payment of the debt. Plaintiff contends now that you should find from this evidence, and by its greater weight, that the value of the property was not in excess of six thousand dollars, and offers you the evidence of James Carroll and Plott Boyd and T. Raysor Salley, and other witnesses; then the plaintiff contends that it has shown you here by evidence which it says should satisfy you that after advertising this property, after it was in default, for 30 days, it was sold at public sale at the court house door and nobody then was willing to pay on June 19, 1933, in excess of $3,000.00 for it and in order to protect itself that the plaintiff, through a subsidiary corporation, the Madison Investment Company, purchased the property [fol. 24] at the sale for $3,000.00, there being no higher bid offered for it. The plaintiff contends it loaned money to the defendants in the sum of $8,000 in 1928, and that the defendants never did pay back on that loan more than $1,200 and some interest and that at the time of the sale alleged in the complaint that the loan was in default for over a year, both in principal and interest and that after it had made due efforts to collect the amount of the note from the defendants, it then undertook to collect the money out of the security which had been pledged by the defendants by way of deed of trust to secure payment of the money and after giving the notice required in the deed of trust by advertising the property thirty days in a newspaper published in this Coun[illegible] that the property was sold at the Court House Door at public sale on a date set, June 19, 1933, and at that sale it only brought $3,000.00, and after deducting certain expenses of the sale, the balance was credited on the note which left them the amount still unpaid $4,534.79, together with interest from June 19, 1933, so plaintiff contends that the property is old property situated on Grove Street, in this City, that it is a residential property and there is no demand for such property and that you should find from this evidence, and by its greater weight, the burden being upon the plaintiff to satisfy you, that the value of the property, that is the true or fair value of it, the fair worth of it, on the date of the sale on June 19, 1933, was less than the amount of the indebtedness at that time of $7,375.90.

Now, the defendant contends, on the other hand, you should not so find, that you should not be satisfied by the greater weight of the evidence that the property was worth any less than the amount of the debt. Defendant contends it was worth considerably more, that its fair value or true value was some considerable amount in excess of the amount of the indebtedness at that time, and the defendants contend it was worth at least the sum of $8,000.00 or $8,500.00.

Defendants offer you the evidence of certain of their wit- [fol. 25] nesses, C. N. Walker, Assistant Trust Officer of the defendant, Wachovia Bank & Trust Company, who testifies here that he has had experience in real estate deals and has been assistant Trust Officer handling real estate holdings of the bank and the real estate handled by the Trust Department of the bank and in his opinion the fair value of the property on the date of the sale was $8,500.00.

L. L. Merchant testified he had inspected the premises and he is a building contractor here of about 30 years experience, and he tells you the value he placed upon the property today and then the value of the property as of the date of the sale.

Then the defendants offer the testimony of A. G. Carver, real estate and insurance man here, who says he has had ten or eleven years experience, and in his opinion the fair value of the property was sixty dollars per front foot for the 112 feet or $6,720.00, and the house on the property is valued at $2,000.00, making $8,720.00.

Defendants offer you the testimony of J. E. Dunn, real estate dealer, with 13 years experience, as he testifies. He tells you in his opinion the fair value of the property was $50 per front foot or $5600.00 and the building on the premises was of the fair value of $2250.00.

Then the defendants offer you the testimony of H. W. Dysart, real estate dealer, with 9 years experience, as he tells you, and he gives you as his opinion of the fair value of the property on the date of the sale from $8,000 to $9,000.

Mr. R. P. Booth testified for the defendant that he is a real estate man, with 14 years experience and in his opinion the fair value of the property on the date of the sale was $50.00 per front foot and the building $3,000. For the plaintiff, Mr. Dillard testified that the land was of the value of $50.00 per front foot and the house $1,200.00.

Mr. Salley testified for the defendant that in his opinion the fair value of the property was $6,000.00, as I recall it, [fol. 26] but you will not take the Court's recollection about what the witnesses testify. You rely upon your own recollection as to what these witnesses have said. I am reviewing the evidence for your benefit, if it aids you in recalling the testimony, but you will not take my recollection for it. You consider all the testimony and weigh it, give to it the weight you find it is entitled to, after you consider it, under the instructions of the Court.

Now, the fair value or true value is in legal terms sometimes used by the courts, it is not the last dollar the property will bring or what the property might bring under any special circumstances or in the hands of any special dealer or owner, but it is the fair and reasonable market value of the property—that is, what a man of ordinary prudence who owned the property would sell it for or would be willing to sell it for if he was not obliged to sell it to another man of reasonable prudence and intelligence who wanted to buy the property but was not obliged to buy it, not obliged to have it, what those two men would get together and agree upon would be the fair market value of the property or fair worth of it, true value, as the law defines the true value.

You have heard the property described here by the witnesses as a house something in excess of 30 years old, brick house with 12-inch solid brick walls, 5-rooms on the first floor and 3 rooms on the second floor, with baths, and other conveniences for a house of that size, with a lot of 112 ft. frontage by 200 ft. deep, on Grove Street, in the City of Asheville, on which witnesses tell you here is a street on which there is located within a 100 yards of this property the old Meriwether Hospital, now known as Cherokee Inn, several residences and a new Y. W. C. A. building and within a short distance of the main part of the town, and the defendants contend for the reason of the location, even though, defendants contend, you should find the house is an old house and been built a long time, that still it is within territory which would necessarily make it of com- [fol. 27] mercial value, but you are not to consider what its special value would be, but only what its fair market value was on the date of the foreclosure sale, June 19, 1933.

You will consider the testimony of all the witnesses, what they have said about the property, descriptions of it, and

age, and then you find from the evidence what you believe its fair reasonable market value was under the definition the Court has given you.

The burden is upon the plaintiff to satisfy you of its contentions about this matter, and if the plaintiff has satisfied you, by the greater weight of the evidence, that the property is such that it would not have the value in excess of $6,000.00 then you would answer this issue in just such amount as plaintiff has satisfied you, by the greater weight of the evidence, that was the fair market value of the property on the date of the sale, that is, June 19, 1933.

Gentlemen, you are the sole judges of the facts in this case; you are the sole judges; it is your exclusive province to find the facts and to weigh the evidence, and you are the sole judges of the credibility of the witnesses and the weight you will give to their testimony.

The weight of the testimony is not determined entirely by the number of witnesses who testify to a particular fact, but it is determined by the faith and credit you give to the testimony of the witnesses. It is proper for you to consider, in that connection, the demeanor of the witnesses on the stand, his bias or interest, if any appears, the testimony in corroboration or contradiction of the witnesses, if any, consider the witnesses' source of obtaining the facts about which he testified, his ability to see and observe and report accurately what he sees. It is upon this basis that you determine the weight of the testimony. It is a matter of what degree of conviction the testimony of the witnesses produce upon your minds as fair and impartial jurors.

Witnesses who are interested in the result of your ver- [fol. 28] dict, if you find any are, you should scrutinize the testimony of such witnesses, but having done that, if you believe that witness is telling the truth, you would give to the testimony of such witness the same weight you would that of a disinterested witness.

You are the sole judges of what witness you will believe and what witness you will not believe, what part of the testimony of any witness you will believe or disbelieve, but it is your duty to consider and weigh all the testimony, to consider the argument of counsel and to apply the law as given you by the Court, then find the facts from the evidence as you recall it, and as you find the facts you will answer this issue.

The Court has answered the first, second and fourth issues for you by consent of counsel, so the only issues you are interested in answering here is the third issue. You will answer that issue in just such amount as you find by the greater weight of the evidence in this case is the fair or was the fair market value of the property or the true value of the property on the date of the sale on June 19th, 1933.

The greater weight of the evidence is that evidence which outweighs and preponderates all the other evidence, not whether the evidence is elicited from the plaintiffs' witnesses or defendants' witnesses, but it is the greater weight of the evidence, preponderance of all the evidence.

Whatever amount you find by the greater weight of the evidence in this case, you will answer this third issue in that amount.

Plaintiff contends you should answer it not to exceed six thousand dollars, and the burden is upon the plaintiff to satisfy you by the greater weight of the evidence of its contentions in order that you may answer that issue according to the contentions of the plaintiff. If the plaintiff has not satisfied you of such evidence and by its greater weight, then you will proceed to answer the issue in such amount as you are satisfied by the greater weight of the evidence was the true value of the property, fair market [fol. 29] value of the property as it has been defined to you, on the date of the sale.

(Addressing Counsel: Gentlemen, if I have overlooked any contention, I will be glad to state it for you.) (No response.)

You may take the issues and retire and make up your verdict and return it to the courtroom as soon as you have answered that issue.

Gentlemen, before you consider this case and answer that issue, I want to correct one part of the charge I gave you and to add to it—I told you that the burden of proof was on the plaintiff to satisfy you by the greater weight of the evidence of its contention that the property was not worth in excess of six thousand dollars. That is true to that extent, but not any further. The burden of proof in this case and on that issue is really upon the defendants to satisfy you by the greater weight of the evidence of

their contentions that the property was fairly worth the amount of the debt.

The statute says it shall be competent and legal for the defendant against whom such deficiency judgment is sought to allege and show, that is, the defendant must set out in his complaint (answer) and must show you by the greater weight of the evidence as a matter of defense that the property was fairly worth the amount of the debt secured by it at the time and place of the sale or that the bid was substantially less than its true value, so the burden is upon the defendants in this case, the Wachovia Bank & Trust Company, and its co-defendant, Mr. Johnson, to satisfy you by the greater weight of the evidence that the value of the property, fair value, or fair worth, or true value on the date of the sale was equal to the debt on the day of the sale or in excess of it. Just whatever amount you are satisfied from all this evidence in this case was the true value of the property on that date you will answer that issue, but the burden is on the defendants to satisfy you by the greater weight of the evidence of their contentions that the property at the time was of the fair value which [fol. 30] was equal to the amount of the debt as you see in the answer to the first issue. With that correction, you may retire and consider the case and return your verdict. (B.)

The plaintiff excepts to the giving of so much of the charge between the letters (A) and (B) and as refers to the third issue, and assigns error. This is plaintiff's Exception No. 6.

IN GENERAL COUNTY COURT OF BUNCOMBE COUNTY

JUDGMENT

This cause coming on to be heard before His Honor, J. P. Kitchin, Judge of the General County Court of Buncombe County, and a jury, and being heard, and the jury having answered the issues as follows:

1. What was the amount of the indebtedness secured by the deed of trust described in the complaint on June 19, 1933?

A. $7,375.69.

2. Did the plaintiff either directly or indirectly become the purchaser of the property at the foreclosure sale?
A. Yes.

3. What was the property sold fairly worth at the time and place of sale?
A. $8,000.00.

4. What amount was unpaid on the note described in the complaint after all credits have been allowed immediately subsequent to the sale on June 19th, 1933?
A. $4,534.79:

and said issues having determined that the property described in the pleadings was fairly worth more than the amount of the debt due from the defendants to the plaintiff at the time of sale:

It is Therefore Ordered and Adjudged that the plaintiff take nothing by its action and that the defendants go hence without day and recover of the plaintiff their costs in this action incurred.

It is Further Ordered and Adjudged that the plaintiff pay the costs of this action to be taxed by the Clerk.

[fol. 31] This the 26th day of January, 1935.

J. P. Kitchin, Judge, General County Court, Buncombe County.

APPEAL ENTRIES

Upon the coming in of the foregoing judgment the plaintiff moves the Court for judgment notwithstanding the verdict, which motion is overruled and plaintiff excepts to the signing of the foregoing judgment and, in open court, gives notice of appeal to the Superior Court of Buncombe County for errors assigned and to be assigned. Further notice waived. Appeal bond in the sum of $25.00 adjudged sufficient. Plaintiff allowed 40 days in which to serve case on appeal upon defendant, and defendant allowed 40 days thereafter in which to serve countercase.

J. P. Kitchin, Judge, General County Court, Buncombe County.

This is plaintiff's Exceptions Nos. 7 and 8.

In General County Court of Buncombe County

Assignments of Error on Appeal from General County Court to the Superior Court

Plaintiff appellant respectfully assigns the following errors, as having been committed by the Court in the trial of this action:

First Assignment of Error

To the action of the Court in overruling the plaintiff's motion for judgment on the pleadings after the close of plaintiff's evidence. Exception No. 1, R. p. 14.

Second Assignment of Error

To the action of the Court in refusing to sustain the exception to a question asked witness, and refusal to strike out the answer. Exception No. 2, (R. p. 19).

Third Assignment of Error

To the action of the Court in overruling the plaintiff's motion for judgment on the pleadings at the close of defendants' testimony. Exception No. 3, (R. p. 19).

Fourth Assignment of Error

To the action of the Court in refusing to render judgment [fol. 32] in favor of the plaintiff and on the pleadings at the close of all the evidence. Exception No. 4, (R. p. 21).

Fifth Assignment of Error

To the action of the Court in submitting, over plaintiff's objection, Issues Nos. 2 and 3, as appear in the record. Exception #5, (R. p. 21).

Sixth Assignment of Error

To the charge of the Court between the letters (A) and (B) as appear in the record, and which charge was on the issue No. 3 as appears in the record. Exception No. 6, (R. pp. 23 to 30).

Seventh Assignment of Error

To the action of the Court in signing the judgment as appears in the record. Exception No. 7, (R. p. 31).

Eighth Assignment of Error

To the refusal of the Court for judgment in favor of the plaintiff notwithstanding the verdict as appears in the record. Exception No. 8, (R. p. 31).

This the 5th day of March, 1935.

Harkins, Van Winkle & Walton, Attorneys for Plaintiff.

Service of the foregoing case on appeal accepted and the receipt of a copy thereof in apt time is acknowledged, this March 5th, 1935.

Parker, Bernard & DuBose, Attorneys for Defendants.

In Superior Court of Buncombe County

Judgment

This cause coming on to be heard, and being heard before His Honor, John M. Oglesby, Judge presiding over the Superior Courts of the 19th Judicial District, at the August Term, 1935, of the Superior Court of Buncombe County, upon the appeal of the plaintiff, Richmond Mortgage & Loan Corporation, from the judgment entered in the General County Court of Buncombe County, and the exceptions filed by the plaintiff as appear in the record, and each of said exceptions having been duly considered separately, the [fol. 33] following rulings thereon have been made by the undersigned Judge:

Exception and assignment of error No. 1 is not sustained;

Exception and assignment of error No. 2 is not sustained;
Exception and assignment of error No. 3 is not sustained;
Exception and assignment of error No. 4 is not sustained;
Exception and assignment of error No. 5 is not sustained;
Exception and assignment of error No. 6 is not sustained;
Exception and assignment of error No. 7 is not sustained;
Exception and assignment of error No. 8 is not sustained.

It is therefore ordered, adjudged and decreed that the judgment of the General County Court, and as rendered in the above cause at the January Term, 1935, be and the same is hereby in all respects affirmed.

It is further ordered, adjudged and decreed that the defendants recover of the plaintiff their costs herein incurred to be taxed by the Clerk, and that the Clerk of this Court certify a copy of this judgment to the General County Court of Buncombe County.

This 19th day of August, 1935.

John M. Oglesby, Judge Presiding.

Appeal Entries

The plaintiff objects and excepts to the action of the Court in not sustaining its assignments of error to the Superior Court, and to the overruling of each and every of said assignments of error and exceptions, and excepts to the signing and entry of the foregoing judgment, and gives notice of appeal in open Court to the Supreme Court of North Carolina. Further notice waived.

Appellant allowed to the 10th day of September in which to serve on appellees case on appeal, and appellees allowed 10 days thereafter in which to serve countercase on appeal. Appeal bond for costs in the sum of $75.00 adjudged to be [fol. 34] sufficient.

John M. Oglesby, Judge Presiding.

In Superior Court of Buncombe County

Plaintiff Appellant's Assignments of Error on Appeal to the Supreme Court

The plaintiff appellant respectfully assigns the following errors as having been committed by the Superior Court in the hearing of this case on appeal in said Court from the General County Court:

Assignment of Error No. 1

To the action of the Superior Court in not sustaining plaintiff's first assignment of error on appeal from the General County Court to the Superior Court, (R. p. 14) which assignment of error is in words and figures as follows:

"First Assignment of Error: To the action of the Court in overruling plaintiff's motion for judgment on the pleadings at the close of plaintiff's evidence as shown by Exception No. 1, (R. p. 14.)"

Assignment of Error No. 2

To the action of the Superior Court in not sustaining plaintiff's second assignment of error on appeal from the General County Court to the Superior Court, (R. p. 19), which assignment of error is in words as follows:

"Second Assignment of Error; To the action of the Court in refusing to sustain the exception to a question asked witness and refusal to strike out answer. Exception No. 2, (R. p. 19)."

Assignment of Error No. 3

To the action of the Superior Court in not sustaining plaintiff's third assignment of error on appeal from the General County Court to the Superior Court (R. p. 19), which assignment of error is in words and figures as follows:

"Third Assignment of Error: To the action of the Court in overruling plaintiff's motion for judgment on the pleadings at the close of defendants' testimony, Exception No. 3, (R. p. 19)."

[fol. 35] Assignment of Error No. 4

To the action of the Superior Court in not sustaining plaintiff's fourth assignment of error on appeal from the General County Court to the Superior Court. (R. p. 21), which assignment of error is in words as follows:

"Fourth Assignment of Error: To the action of the Court in refusing to render judgment in favor of the plaintiff, and on the pleadings, at the close of all the evidence. Exception No. 4, (R. p. 21)."

Assignment of Error No. 5

To the action of the Superior Court in not sustaining plaintiff's fifth assignment of error on appeal from the

General County Court to the Superior Court (R. p. 21) which assignment of error is in words as follows:

"Fifth Assignment of Error: To the action of the Court in submitting, over plaintiff's objection, issues Nos. 2 and 3, as appear in the record. Exception No. 5, (R. p. 21)."

Assignment of Error No. 6

To the action of the Superior Court in not sustaining plaintiff's 6th assignment of error on appeal from the General County Court to the Superior Court, (R. p. 23 to 30); which assignment of error is in words and figures as follows:

"Sixth Assignment of Error. To the charge of the court between the letters A and B as appear in the record, and which charge was on the issue No. 3 as appears in the record. Exception No. 6, (R. pp. 23 to 30)."

Assignment of Error No. 7

To the action of the Superior Court in not sustaining plaintiff's 7th assignment of error on appeal from the General County Court to the Superior Court, (R. p. 31), which assignment of error is in words as follows:—

"Seventh Assignment of Error: To the action of the Court in signing the judgment as appears in the record. Exception No. 7, (R. p. 31)."

[fol. 36] Assignment of Error No. 8

To the action of the Superior Court in not sustaining plaintiff's 8th assignment of error on appeal from the General County Court to the Superior Court, (R. p. 31) which assignment of error is in words as follows:

"Eighth Assignment of Error: To the refusal of the Court for judgment in favor of the plaintiff notwithstanding the verdict as appears in the record. Exception No. 8, (R. p. 31)."

Assignment of Error No. 9

To the action of the Superior Court in signing the judgment as set out in the record. (R. p. 33).

This the — day of August, 1935.

Harkins, Van Winkle & Walton, Attorneys for Plaintiff.

IN SUPERIOR COURT OF BUNCOMBE COUNTY

STIPULATION AS TO RECORD

It is stipulated and agreed by and between counsel that this action was properly instituted and that the caption in the record shows all and the proper parties to said action: that the foregoing statement of case on appeal was served in apt time and that the foregoing constitutes the agreed statement of case on appeal and that summons, formal parts of the pleadings and verifications thereof need not be copied into the record.

This the 19th day of August, 1935.

Harkins, Van Winkle & Walton, Attorneys for Plaintiff. Parker, Bernard & DuBose, Attorneys for Defendant.

Cash Appeal Bond.

Transcript Certified by Clerk Superior Court.

[fol. 37]

Copy

IN SUPREME COURT OF NORTH CAROLINA

LOAN CORPORATION

v.

TRUST CO.

210 N. C., 30

Appeal by plaintiff from Oglesby, J., at August Term, 1935, of Buncombe. Affirmed.

OPINION

This is an action to recover judgment for the amount due on certain notes which were executed by the defendants and are now owned by the plaintiff.

The action was begun in the general county court of Buncombe County on 18 June, 1934. The facts admitted in the pleadings are as follows:

On 15 August, 1928, the defendants executed and delivered to the State-Planters Bank of Richmond, Virginia, their promissory notes aggregating in amount $8,000.00. The consideration for said notes was the sum of $8,000.00, which was loaned to the defendants by the State-Planters Bank on or about 15 August, 1928. The said notes, with interest at the rate of six per cent per annum from date, payable semi-annually, were due and payable from time to time until 15 August, 1933, when the last of said notes was due. At the date of the commencement of this action the plaintiff was the holder and owner of said notes.

Contemporaneously with the execution of said notes, and for the purpose of securing their payment, as they should severally become due, the defendants executed a deed of trust by which they conveyed to the trustees named therein a certain lot of land, together with the building located thereon, situate in the city of Asheville, Buncombe County, North Carolina. This deed of trust contained a power of sale by which, upon the default of the defendants in the payment of said notes as the same became due, and upon the request of the holder of said notes, the trustees were authorized and empowered to sell the lot of land described therein, and to apply the proceeds of the sale as a payment on said notes. The deed of trust was duly recorded in the office of the register of deeds of Buncombe County.

After they had paid the sum of $1,200.00 on the principal, and had also paid the interest which had accrued on said notes prior to 15 August, 1932, the defendants defaulted in the payment of principal and interest due at said date. Because of such default, and at the request of the plaintiff as the holder of said notes, the trustees named in the deed of trust, after fully complying with all its provisions, offered the lot of land described in the deed of trust for sale on 19 June, 1933. At said sale, the Madison Investment Company was the last and highest bidder for said lot of land in the sum of $3,000.00. This bid was not raised within ten days after the sale, and thereafter the trustees conveyed said lot of land to the Madison Investment Company, and applied the proceeds of the sale, to wit: The sum of $2,841.11, as a payment on the amount then due on said notes, to wit: The sum of $7,375.90, leaving the amount due on said notes at the date of the commencement of this action $4,534.79, with interest from 19 June, 1933.

On the facts admitted in the pleadings, the plaintiff demanded judgment that it recover of the defendants the sum of $4,534.79, with interest from 19 June, 1933, and the costs of the action.

[fol. 38] In their answer, in defense of plaintiff's recovery in this action, the defendants alleged that as the result of the sale of the lot of land described in the deed of trust securing the payment of the notes sued on in this action, on 19 June, 1933, and of its subsequent conveyance by the trustees pursuant to said sale, the plaintiff has become the owner of said lot of land; that the amount bid for said lot of land on 19 June, 1933, to wit: The sum of $3,000.00, was not its fair value at said date; and that at said date, the said lot of land was fairly worth the amount then due to the plaintiff on said notes.

The defendants prayed judgment that the plaintiff recover nothing in this action, and that they recover of the plaintiff their costs incurred in the action.

At the trial, the plaintiff admitted that the Madison Investment Company purchased the lot or parcel of land described in the deed of trust for and on behalf of the plaintiff, and that the plaintiff was the holder and owner of the notes secured by said deed of trust at the date of the sale.

Issues submitted to the jury were answered as follows:

"1. What was the amount of the indebtedness secured by the deed of trust described in the complaint on 19 June, 1933?"

Answer. "$7,375.90."

"2. Did the plaintiff, either directly or indirectly, become the purchaser of the property at the foreclosure sale?"

Answer. "Yes."

"3. What was the property sold fairly worth at the time and place of the sale?"

Answer. "$8,000.00."

"4. What amount was unpaid on the notes described in the complaint after all credits have been allowed immediately subsequent to the sale on 19 June, 1933?"

Answer. "$4,534.79."

From judgment on the verdict that plaintiff recover nothing of the defendants, and that defendants recover of

the plaintiff their costs, the plaintiff appealed to the Superior Court of Buncombe County, assigning errors in the trial and in the judgment.

At the hearing of its appeal, neither of plaintiff's assignments of error was sustained.

From judgment affirming the judgment of the general county court, the plaintiff appealed to the Supreme Court, assigning as errors the refusal of the judge of the Superior Court to sustain its assignments of error on its appeal from the judgment of the general county court.

Harkins, Van Winkle & Walton for plaintiff.
Parker, Bernard & DuBose for defendants.

CONNOR, J.:

Chapter 275, Public Laws of North Carolina, 1933, is entitled "An act to regulate the sale of real property upon the foreclosure of mortgages or deeds of trust." The Act was ratified on 18 April, 1933, and has been in full force and effect since said date. It applies only to a sale made by a mortgagee or trustee under a power of sale contained in a mortgage, deed of trust, or other instrument, securing the payment of money. It does not apply to a sale made under an order, judgment, or decree in an action to foreclose a mortgage or deed of trust, or similar instrument. [fol. 39] In sections 1 and 2 of the Act it is provided that where real property has been offered for sale by a mortgagee, or by a trustee under the power of sale contained in a mortgage or deed of trust, and the sum bid at such sale is inadequate, and for that reason the consummation of the sale would be inequitable, because it would result in irreparable damage to the mortgagor or grantor in the deed of trust, or to any other person having a legal or equitable interest in the property, the mortgagor, or the grantor, or any other interested person, at any time before the consummation of the sale, may apply to a judge of the Superior Court for an order enjoining the consummation of the sale, and that in such case the judge of the Superior Court may enjoin the consummation of the sale, and may order a resale of the property by the mortgagee, by the trustee, or by a commissioner appointed by him for that purpose, upon such terms as he may deem just and equitable.

The validity of these sections of the statute was challenged in Woltz v. Deposit Co., 206 N. C. 239, 173 S. E. 587. The challenge was not sustained. It was held by this Court that sections 1 and 2 of the statute are valid, and were applicable to the facts in that case. This decision was approved in Hopkins v. Swain, 206 N. C., 174 S. E. 409, in Miller v. Short, 206 N. C., 732, 175 S. E., 135, and in Barringer v. Trust Co., 207 N. C., 505, 177 S. E. 795.

Speaking of sections 1 and 2 of the statute, it was said in Woltz v. Deposit Co., supra: "The statute does not violate any provision of the Constitution of the United States, or of the Constitution of the State of North Carolina, by which limitations are imposed upon the legislative power of the General Assembly of this State. It does not impair the obligation of the contract entered into by and between the parties to the mortgage or to the deed of trust; it does not deprive either party of property without due process of law; nor does it confer upon mortgagors or grantors in deeds of trust any exclusive privilege. The statute is remedial only, and is valid for the purpose. It is applicable to a sale made since its enactment, although the sale was made under a power of sale contained in a mortgage or deed of trust executed prior to its enacement."

In the instant case, the validity of section 3 of the statute is challenged by the appellant on the ground that its enactment by the General Assembly of this State was in violation of section 10 of Article I of the Constitution of the United States, of the Fifth Amendment, and of section 1 of the Fourteenth Amendment of said Constitution, and was also in violation of sections 7, 17, and 35 of Article I of the Constitution of the State of North Carolina, in that said section impairs the obligation of the contract entered into by and between the plaintiff and the defendant prior to its enactment.

Section 3 of chapter 275, Public Laws of North Carolina, 1933, is as follows: "Sec. 3. When any sale of real estate or personal property has been made by a mortgagee, trustee, or other person authorized to make the same, at which the mortgagee, payee, or other holder of the obligation thereby secured becomes the purchaser and takes title either directly or indirectly, and thereafter such mortgagee, payee, or other holder of the secured obligation, as aforesaid, shall sue for and undertake to recover a deficiency judgment

against the mortgagor, trustor, or other maker of any such obligation whose property has been so purchased, it shall be competent and lawful for the defendant against whom [fol. 40] such deficiency judgment is sought to allege and show as a matter of defense and offset, but not by way of counterclaim, that the property sold was fairly worth the amount of the debt secured by it at the time and place of sale, or that the amount bid was substantially less than its true value, and upon such showing, to defeat or offset any deficiency judgment against him, either in whole or in part: Provided, this section shall not affect nor apply to the rights of other purchasers or of innocent purchasers, nor shall it be held to affect or defeat the negotiability of any note, bond, or other obligation secured by such mortgage, deed of trust, or other instrument: Provided, further, this section shall not apply to foreclosure sales made pursuant to an order or decree of court, nor to any judgment sought or rendered in any foreclosure suit, nor to any sale heretofore made and confirmed.

The statute recognizes the obligation of a debtor who has secured the payment of his debt by a mortgage or deed of trust to pay his debt in accordance with his contract, and does not impair such obligation. Nor does the statute hinder, delay, or defeat, in whole or in part, the right of the creditor to enforce such obligation by an action instituted by him against his debtor in a court of competent jurisdiction. There is nothing in the statute which prevents a recovery by the creditor in such action of a judgment for the amount due on the debt. The statute provides only that when the creditor has elected to become the purchaser of the property conveyed by the mortgage or deed of trust at a sale made under a power of sale contained in the mortgage or deed of trust, and thereafter, pursuant to such sale and purchase, acquires title to the property, he shall not recover judgment against his debtor for any deficiency, after the application of the amount of his bid as a payment on the debt, without first accounting to his debtor for the fair value of the property at the time and place of the sale, and that such value shall be determined by the court. In such case, the amount bid by the creditor at the sale, and applied by him as a payment on the debt, is not conclusive as to the value of the property.

We are of the opinion that the statute is valid, and so hold.

The statute involved in this action is not "emergency legislation," nor is its purpose to provide a "moratorium" for debtors during a temporary period of depression. For this reason, the cases cited by appellant from other jurisdictions are not applicable in the instant case. The statute recognizes the validity of powers of sale contained in mortgages or deeds of trust, but regulates the exercise of such powers by the application of well settled principles of equity. It does not impair the obligation of contracts, but provides for judicial supervision of sales made and conducted by creditors whose debts are secured by mortgages or deeds of trust, and thereby provides protection for debtors whose property has been sold and purchased by their creditors for a sum which was not a fair value of the property at the time of the sale. See Better Plan Building & Loan Asso. v. Holden (N. J.), 169 Atl., 289.

The statute is applicable in the instant case, and supports the judgment of the Superior Court. For that reason the judgment is

Affirmed.

Devin, J., took no part in the consideration or decision of this case.

[fol. 41] In Supreme Court of North Carolina, Buncombe County, Term, 1936

No. 113

Richmond Mortgage & Loan Asso.

vs.

Wachovia Bank & Trust Co. and Alexandra Garrett Johnston, Executors of Estate of Robt. P. Johnston, Dec'd.

Judgment—Filed April 29, 1936

This cause came on to be argued upon the transcript of the record from the Superior Court of Buncombe County:—upon consideration whereof, this Court is of opinion that there is no error in the record and proceedings of said Superior Court.

It is, therefore, considered and adjudged by the Court here, that the opinion of the Court, as delivered by the Honorable Geo. W. Connor, Justice, be certified to the said Superior Court, to the intent that the judgment is affirmed.

And it is considered and adjudged further, that the plaintiff Mortgage & Loan Corp. do pay the costs of the appeal in this Court incurred, to-wit, the sum of Eighteen 60/100 dollars ($18.60) and execution issue therefor.

Edward Murray, Clerk of the Supreme Court.
(Seal.)
A True Copy.

[File endorsement omitted.]

[fol. 42] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR APPEAL

Considering itself aggrieved by the final decision and judgment of the Supreme Court of the State of North Carolina in the above entitled cause, the appellant therein, Richmond Mortgage & Loan Corporation, hereby prays that an appeal be allowed to the Supreme Court of the United States and for an Order fixing the amount of the bond thereon.

Dated July 9th, 1936.

Kester Walton, Counsel for Appellant.

[fol. 43] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS

The above named appellant, Richmond Mortgage & Loan Corporation, believing itself aggrieved by the final decision and judgment of the Supreme Court of the State of North Carolina in the above entitled cause, and having

petitioned for an appeal to the Supreme Court of the United States, hereby assigns the following errors in the record and proceedings in the said case.

1

The Supreme Court of the State of North Carolina erred in refusing to find Section 3, Chapter 275, of the Public Laws of North Carolina, Session 1933, unconstitutional and repugnant to Article 1, Section 10, of the Constitution of the United States because, as construed and applied to this appellant, it results in impairing the obligation of a contract entered into by the respondents and which said contract is owned by the appellant and which said contract [fol. 44] was entered into and executed prior to the passage of said above referred to Act.

2

The Supreme Court of North Carolina erred in holding Section 3, Chapter 275, of the Public Laws of North Carolina, Session 1933, applicable in the above cause because, as construed and applied to this appellant, it resulted in depriving appellant of a judgment against the respondents to which it was entitled in accordance with the laws of the State of North Carolina at the time the contract which is the subject matter of the action was entered into.

3

The Supreme Court of North Carolina erred in affirming the judgment of the Superior Court and in refusing to reverse said judgment upon the ground that the said Superior Court erred in affirming the judgment of the General County Court denying to the appellant the right to have judgment rendered in its favor and on the pleadings as filed in said cause and at the close of all the evidence.

4

The Supreme Court of the State of North Carolina erred in rendering a final judgment or decree against the appellant upon the 29th day of April, 1936 in the above entitled cause.

Dated July 9th, 1936.

Kester Walton, Counsel for Appellant.

[fol. 45] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

PRAYER FOR REVERSAL

Considering itself aggrieved by the final decision and judgment of the Supreme Court of the State of North Carolina in the above entitled cause, the appellant, Richmond Mortgage & Loan Corporation, hereby files a petition for appeal to the Supreme Court of the United States and its assignment of errors, for which errors the said appellant, Richmond Mortgage & Loan Corporation, prays that said judgment of the Supreme Court of North Carolina, dated April 29th, 1936 in the above entitled cause, be reversed and a judgment rendered in favor of said appellant, and for costs.

Dated July 9th, 1936.

Kester Walton, Attorney for Appellant.

[fols. 46-48] Bond on appeal for $1,000.00, approved July 10, 1936, omitted in printing.

[fol. 49] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL

The appellant in the above entitled suit, Richmond Mortgage & Loan Corporation, having prayed for the allowance for an appeal in this cause to the Supreme Court of the United States from the judgment made and entered in the above entitled suit by the Supreme Court of the State of North Carolina on the 29th day of April, 1936, and having presented and filed its petition for appeal, assignment of errors and prayer for reversal, pursuant to the statutes and laws of the Supreme Court of the United States in such cases made and provided. And the undersigned, the Chief Justice of the Supreme Court of the State of North Carolina, being the highest court of the State in which a de-

cision in this suit could be had, having found that the appellant in said State Court of North Carolina drew in question the validity of a statute of the State of North Carolina on the ground of its being repugnant to the Constitution of the United States, and that the decision of the said State [fol. 50] Supreme Court of North Carolina was in favor of the validity of the said statute;

It is Now, Here, Ordered, that an appeal be, and the same is, hereby allowed to the Supreme Court of the United States from the Supreme Court of the State of North Carolina in the above entitled cause, as provided by law; and it is further ordered that the Clerk of the Supreme Court of the State of North Carolina shall prepare and certify a transcript of the record, proceedings, and judgment in this cause, and transmit the same to the Supreme Court of the United States so that he shall have the same in said Court within thirty (30) days of this date.

And it is Further Ordered that security for costs on appeal be fixed in the sum of One Thousand Dollars ($1,000.00) and that the appeal bond presented by said appellant for One Thousand Dollars ($1,000.00) be and the same is hereby approved.

Dated July 10th, 1936.

W. P. Stacy, Chief Justice of the Supreme Court of the State of North Carolina.

[fol. 51] In Supreme Court of the United States

[Title omitted]

Præcipe for Transcript of Record

The Clerk of the Supreme Court of the State of North Carolina, in preparing and transmitting the record in the above entitled cause to the Supreme Court of the United States, will include in the record the following:

1. The printed record in this cause in the Supreme Court of the State of North Carolina, pages 1 to 36, inclusive.
2. The opinion of the Supreme Court of the State of North Carolina, rendered on appeal in this cause.
3. The judgment of the Supreme Court of the State of North Carolina, entered April 29, 1936, affirming the judg-

ment of the Superior Court for Buncombe County in this cause.

4. The appellant's petition for appeal to the Supreme Court of the United States, assignment of errors, prayer [fol. 52] for reversal, appeal bond and the order of the Chief Justice of the Supreme Court of the State of North Carolina allowing the appeal to the Supreme Court of the United States, dated the 10th day of July, 1936, statement of jurisdiction under Rule XII, and this præcipe.

5. The citation on appeal to the Supreme Court of the United States and the proof of service thereof on the respondents, Wachovia Bank and Trust Company and Alexandra Garrett Johnston, Executors of the Estate of Robert P. Johnston, deceased, filed with you on the 10th day of July, 1936.

Dated 10th day of July, 1936.

Kester Walton, Counsel for Appellant.

Service of the foregoing præcipe acknowledged, this the 13th day of July, 1936.

S. G. Bernard, Attorney of Record for Wachovia Bank & Trust Company and Alexandra Garrett Johnston, Executors of the Estate of Robert P. Johnston, Deceased.

[fols. 53 & 54] Citation, in usual form, showing service on S. G. Bernard, omitted in printing.

[fol. 55] In Supreme Court of North Carolina

Richmond Mortgage & Loan Company

v.

Wachovia Bank & Trust Company and Alexander Garrett Johnson, Executors of Robt. J. Johnson, Deceased.

Appeal docketed 20 August, 1935.
Case argued 5 September, 1935.
Opinion filed 29 April, 1936.
Final judgment entered 29 April, 1936.

CLERK'S CERTIFICATE

I, Edward Murray, Clerk of the Supreme Court of North Carolina, do hereby certify the foregoing to be a full, true and perfect copy of the record and proceedings in the above entitled case, as the same now appear from the originals on file in my office.

I further certify that no petition to rehear has been filed, and that the time for filing such petition under the rules of this Court has expired.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at office in Raleigh, North Carolina, this 17 July, 1936.

Edward Murray, Clerk of the Supreme Court of the State of North Carolina. (Seal of the Supreme Court of the State of North Carolina.)

[fol. 56] IN SUPREME COURT OF THE UNITED STATES

Statement of Points Relied Upon by Appellant and Designation of Portions of Record to be Printed—Filed July 28, 1936

STATEMENT OF POINTS RELIED UPON BY APPELLANT

Richmond Mortgage & Loan Corporation, appellant in the above entitled cause, in order to secure a reversal of the judgment appealed from, will rely upon the following points:

1. The Supreme Court of the State of North Carolina erred in refusing to find Section 3, Chapter 275, of the Public Laws of North Carolina, Session 1933, unconstitutional and repugnant to Article 1, Section 10 of the Constitution of the United States, because, as construed and applied to this appellant, it results in impairing the obligation of a contract entered into by the respondents, and which said contract is owned by the appellant, and which said contract was entered into and executed prior to the passage of the above referred to Act.

[fol. 57] 2. The Supreme Court of North Carolina erred in holding Section 3, Chapter 275, of the Public Laws of

North Carolina, Session 1933, applicable in the above cause, because, as construed and applied to this appellant, it resulted in depriving appellant of a judgment against the respondents, to which it was entitled in accordance with the laws of the State of North Carolina at the time the contract, which is the subject matter of the action, was entered into.

3. The Supreme Court of North Carolina erred in affirming the judgment of the Superior Court, and in refusing to reverse said judgment upon the ground that the said Superior Court erred in affirming the judgment of the General County Court, denying to the appellant the right to have judgment rendered in its favor and on the pleadings as filed in said cause, and at the close of all the evidence.

4. The Supreme Court of the State of North Carolina erred in rendering a final judgment and decree against the appellant upon the 29th day of April, 1936 in the above cause.

DESIGNATION OF PORTIONS OF RECORD TO BE PRINTED

The Clerk of this Court will print the entire record in the above entitled cause, transmitted from the Supreme Court of the State of North Carolina.

Kester Walton, Counsel for Appellant.

We, the undersigned, attorneys for the appellee, consent to the foregoing designation of the parts of the record to be [fol. 58] printed. This the 13th day of July, 1936.

S. G. Bernard, Attorney for Wachovia Bank & Trust Company and Alexandra Garrett Johnston, Executors of the Estate of Robert P. Johnston, Deceased.

STATE OF NORTH CAROLINA,
County of Buncombe:

On this the 13th day of July, in the year of our Lord, One Thousand Nine Hundred Thirty-six, personally appeared Kester Walton, before me the subscriber, a Notary Public, in and for the County of Buncombe, State of North Carolina, and makes oath that he delivered a true copy of the within statement to S. G. Bernard, attorney for appellee, Wachovia Bank & Trust Company and Alexandra Gar-

rett Johnston, Executors of the Estate of Robert P. Johnston, deceased, on the 13th day of July, 1936.

Lorene Weaver, Notary Public, Buncombe County, N. C. My commission expires February 19, 1938. (Seal.)

[fol. 59] [File endorsement omitted.]

Endorsed on cover: File No. 40,775. North Carolina Supreme Court. Term No. 235. Richmond Mortgage & Loan Corporation, appellant, vs. Wachovia Bank and Trust Company and Alexandra Garrett Johnston, Executors of the Estate of Robert P. Johnston, deceased. Filed July 28, 1936. Term No. 235, O. T., 1936.

(8325-C)